under §2255 is unavailable. The Savings Clause was not amended or curtailed by the AEDPA. *See*, for example, *Gray-Bey v. United States*, 209 F. 3d 986 (7th Cir. 2000), *In re Hanserd*, 123 F. 3d 922 (6th Cir. 1997) and *Hernandez v. Campbell*, 204 F.3d 861 (9th Cir. 2000). The pattern of subsequent cases, however, discloses few in which jurisdiction pursuant to the Savings Clause was accepted and the merits of the petition were determined in order to grant or deny relief.

The result is the Savings Clause is converted to a bar. This judicially created suspension of habeas corpus contradicts Congress and principles proclaimed by this Court in *United States v. Hayman*, 342 U.S. 205, 219 (1952) and *Sanders v. United States*, 373 U.S. 1, 14-15 (1963). In *Sanders*, this Court suggested if relief is barred and unavailable, it is the equivalent of "inadequate or ineffective." *Sanders* and *Hayman* were pre-AEDPA cases that today have particular vitality because the constitutional impact of the AEDPA changes. Unlike the 1948 enactments, after the 1996 AEDPA amendments, §2255 is not the full procedural and functional equivalent of habeas corpus, *unless* the Savings Clause safety valve gate allows rather than prevents §2241 jurisdiction. The limitations that prompted this Court in *Sanders* to state, "the gravest constitutional doubts would be engendered", (373 U.S. at 14) are now at issue because the Savings Clause is interpreted to provide no relief.

For every case claiming an unlawful or illegal confinement in which §2255 relief is unavailable by virtue of a prior denial, the Savings Clause provides the only basis for jurisdiction. The jurisdictional grant "is inadequate or

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but would be a substantial portion of those petitions. United States Department of Justice, Office of Justice Programs, Bureau of Justice Statistics Special Report – prison petitioners file in United States District Courts, 2000 with trends 1980-2000. January 2002.

ineffective," has been applied to avoid and not to preserve habeas corpus. What appears to be a clear authorization of habeas corpus jurisdiction has been effectively repealed by semantic concepts. There is no meaningful discussion of what is "inadequate" and what is "ineffective," instead the phrases "denial of relief under §2255 does not entitle you to seek relief under §2241" and "§2241 applies to the execution of the sentence and §2255 applies to the validity of the sentence" are repeated like all encompassing latin maxims. The language of the Tenth Circuit's order in this case is a virtual template for the dispositions of §2241 petitions for habeas corpus:

> Normally, '[a] petition under 28 U.S.C. §2241 attacks the execution of a sentence rather than its validity and must be filed in the district where the prisoner is confined. A 28 U.S.C. §2255 petition attacks the legality of detention, and must be filed in the district that imposed the sentence.' ... Section 2241 'is not an additional, alternative, or supplemental; remedy to 28 U.S.C. §2255.' ... Only if the petitioner shows that §2255 is "inadequate or ineffective" to challenge the validity of a judgment or sentence may a prisoner petition for such a remedy under 28 U.S.C. §2241. ... 'Failure to obtain relief under §2255 does not establish that the remedy so provided is either inadequate or ineffective.'

App. A, p. 3.

The result creates a jurisdictional quandary for obtaining habeas corpus relief. There would be no forum in which relief could be entertained. Congress enacted the Savings Clause to protect habeas corpus. Subsection (c)(3) of §2241 should not be rejected out of hand; "is in custody of

violation of the Constitution or laws..." Decisions by this Court concerning constitutional implications of restricting access to habeas corpus relief should be respected.

This Court recognizes limitations on habeas corpus raise constitutional questions. Rulings by this Court discussing the interrelationship among §2255, the Savings Clause, and §2241 relief, provide important guidelines. Following the 1948 enactment of §2255 granting jurisdiction for post-conviction relief in the sentencing court, this Court upheld its constitutionality because the statute did not "impinge upon prisoners' rights of collateral attack."

> Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions. On the contrary, the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum.

United States v. Hayman, 342 U.S. 205, at 219 (1952).

This is no longer true. Without the Savings Clause safety valve, the AEDPA amendments, §2255 do impinge upon traditional habeas corpus rights. The constitutional concern over limitations and the provisions for the safety valve were discussed and explained in *Sanders*:

> Plainly, were the prisoner invoking s. 2255 faced with the bar of res judicata, he would not enjoy the 'same rights' as the habeas corpus applicant, or 'a remedy exactly commensurate with' habeas. Indeed, if he were subject to any substantial procedural hurdles, which made his remedy under s. 2255 less swift and imperative than federal habeas

corpus, the gravest constitutional doubts would be engendered, as the Court in Hayman implicitly recognized. And cf. p. 1075, supra. We therefore hold that the 'similar relief' provision of s. 2255 is to be deemed the material equivalent of s. 2244. *See Smith v. United States*, 106 U.S.App.D.C. 169, 173, 270 F.2d 921, 925 (1959); Longsdorf, The Federal Habeas Corpus Acts Original and Amended, 13 F.R.D. 407, 424 (1953). We are helped to this conclusion by two further considerations.

First, there is no indication in the legislative history to the 1948 revision of the Judicial Code that Congress intended to treat the problem of successive applications differently under habeas corpus than under the new motion procedure; and it is difficult to see what logical or practical basis there could be for such a distinction.

Second, even assuming the constitutionality of incorporating res judicata in s. 2255, such a provision would probably prove to be completely ineffectual, in light of the further provision in the section that habeas corpus remains available to a federal prisoner if the remedy by motion is 'inadequate or ineffective.' A prisoner barred by res judicata would seem as a consequence to have an 'inadequate or ineffective' remedy under s. 2255 and thus be entitled to proceed in federal habeas corpus – where, of course, s. 2244 applies. *See Smith v. United States*, supra, 106 U.S. App.D.C., at 174, 270 F.2d, at 926.

373 U.S. at 14-15.

The *Sanders* opinion suggested unavailable to be equivalent to "inadequate or ineffective." *Sanders* and *Hayman* were concerned about constitutional limitations on habeas corpus and the constitutional implications of a suspension of such right. The courts below considered the unavailability to file a §2255 motion as immaterial.

The Savings Clause is of great importance because it protects the constitutional right to habeas corpus. Article I, Section 9, Clause 2 of the Constitution provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

The Tenth Circuit and other decisions denying Savings Clause jurisdiction ignore the rationale of *Hayman* and *Sanders*. If these cases are no longer of any viability, this should be proclaimed by this Court, not ignored by the lower federal courts. The cases should be recognized as having even greater significance. The constitutional limitations feared in *Hayman* and *Sanders* now exist because of the restrictions on §2255 and the judicial closing of the Savings Clause safety valve. If Congress now were to repeal the Savings Clause, the constitutionality of §2255 would be in grave doubt under the rationale of *Hayman* and *Sanders*.

Davis had urged *Sanders* in his initial petition for habeas corpus and in his brief to the Tenth Circuit expressly urged and quoted from *Hayman* and *Sanders*. Davis went on to argue:

> ... the rejection of §2241 jurisdiction would convert the Savings Clause of §2255 into an all encompassing rule of procedural default. ... this would make the Savings Clause meaningless

> as well as raise constitutional questions.

Davis' Tenth Circuit Brief pp. 17-19.

Petitioner suggests two basis for allowing §2241 jurisdiction for relief from unconstitutional confinement. First, a petitioner who was denied relief under §2255 and who has a *prima facie* meritorious claim should have the right to invoke §2241 jurisdiction for an initial (first) petition. Alternatively, a petitioner who was denied a Certificate of Appealability, and thus precluded from the opportunity for full, adequate and effective relief, should have the right to invoke §2241 jurisdiction.

Congress has not ordained that the right under the Savings Clause to invoke §2241 jurisdiction is barred if Petitioner's prior §2255 was denied. However, the lower court decisions effectively do so. The Eighth Circuit in *Abdullah v. Hedrick*, 392 F.3d 957, 962-963 (8th Cir. 2004) *cert. den.*, 125 S.Ct. 2984 (2005), reviewed §2241 decisions of several circuits. The cases rejecting §2241 jurisdiction all state that "something more" is required than the unavailability of §2255 relief because of a prior denial. There is no uniformity or consensus of what more must be shown other than whatever the petitioner attempted it is not sufficient. Several circuits have allowed *Bailey* claims to be brought. This was rejected in *Abdullah* which ruled the issues could have been presented under the prior §2255. The circuit cases effectively repeal any use of the Savings Clause. A federal prisoner is precluded from any post conviction relief other than the first attempt at a §2255 motion. What "is inadequate or ineffective" is unobtainable. A state prisoner, by contrast, has the opportunity for full resort to state post conviction relief and then may seek further post conviction relief in the federal courts.

Petitioner Davis sought to show "something more" than the prior denial of the §2255 motion. The full opportunity for §2255 relief was precluded by the denial of the Certificate of Appealability. Petitioner Davis, in addition to stressing that relief *is* unavailable under §2255, expressly argued that his prior §2255 motion *was* inadequate and ineffective because of the refusal of the Eleventh Circuit to issue a Certificate of Appealability.[2] Davis' claim of unconstitutional confinement for life without parole was supported by the holdings of several courts of appeal, including the Tenth Circuit[3] and the Second Circuit[4]. The Second Circuit expressly ruled a sentence involving a conviction for cocaine, cocaine substance and marijuana was to be based on the substance with the least penalty, i.e. marijuana with five years. The greater sentence was held to be fundamental error, prejudicial error and unconstitutional.[5]

Petitioner did not have and was "denied unobstructed procedural opportunity to present his claim."[6] Unlike the other cases cited by the Tenth Circuit and by the Eighth Circuit in *Abdullah*, Davis' §2255 motion was in effect short-circuited. Without the granting of a Certificate of

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[2] The error in the §2255 proceeding could only be reviewed if the Certificate of Appealability had been granted. The denial foreclosed any possibility of effectively safeguarding Emerson Davis' constitutional rights and relief from the illegal sentence. In *Miller-El v. Cockrell*, 537 U.S. 322 (2003), the Supreme Court was concerned that systematic denials of Certificates of Appealability could deny adequate relief under §2255 as amended by the AEDPA. Davis sought certiorari that was denied on November 3, 2003, 540 U.S. 997. He promptly filed the §2241 on December 4, 2003. Emerson Davis has been diligent unlike the petitioner in *Gonzalez v. Crosby*, 545 U.S.___ (2005).

[3] *Newman v. United States*, 817 F.2d 635, 638 (10th Cir. 1987) and *United States v. Pace*, 981 F.2d 1123, 1129 (10th Cir. 1992).

[4] *United States v. Zillgitt*, 286 F.3d, 128, 131 (2nd Cir. 2002).

[5] *Zillgitt*, 286 F.3d at 131.

[6] *Ivy v. Pontesso*, 328 F. 3d 1057, 1061 (9th Cir. 2003).

Appealability, §2255 is not the structural equivalent of habeas corpus that this court in *Hayman* and *Sanders* thought to be so important.

Davis' arguments that relief under §2255 "is inadequate or ineffective" because such relief *is* now unavailable and such relief *was* ineffective or inadequate because of the denial of the Certificate of Appealability were to no avail. The Tenth Circuit opined:

> The petitioner has not established the inadequacy or ineffectiveness of 28 U.S.C. §2255. His brief filed in this court essentially argues that the Eleventh Circuit erred in affirming his conviction and sentence and in denying relief under §2255.

(Appendix B, p. 3)

Unlike §2255, the right to appeal under §2241 still exists. The AEDPA changes now preclude this right and make the Savings Clause safety valve of great importance if §2255 relief is to be equated with traditional habeas corpus.

As was true of the Davis rulings by the courts below, and the other cases cited, there is little heed paid to *Hayman* and *Sanders* and the constitutional prohibitions against suspension of habeas corpus. Under our federal system, this Court is the ultimate guardian of the writ of habeas corpus. For centuries, the great writ has focused on relief from unlawful confinement. This Court has made vigorous efforts to protect this right. Congress has sought to protect this right. Only this Court can illuminate the meaning of the jurisdictional phrase of the Savings Clause "is inadequate or ineffective."

There are several circuit cases demonstrating that the AEDPA by its expressed terms does not limit or restrict the

use of the Savings Clause to seek §2241 habeas jurisdiction. The limitation and restrictions effectively suspending habeas corpus are by judicial decisions.

In *In re Hanserd,* 123 F.3d 922 (6th Cir. 1997), the Sixth Circuit recognized the importance and availability of relief under §2241 in light of the AEDPA. The Sixth Circuit concluded a party barred from filing a second §2255 motion could raise his constitutional claim for wrongful confinement for determination under §2241:

> A §2241 motion would not be barred by the new restrictions on successive motions and petitions. Section 2244(a) allows a district judge to refuse to entertain a repeat application for the writ by a federal prisoner only 'if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.' As discussed above, Hanserd's previous §2255 motion was not an application for a writ of habeas corpus; and, in any case, the exception just quoted, which was inserted by AEDPA §106(a), explicitly states that §2244(a) should not be read to supersede the provisions of §2255. Similarly, §2244(b), which contains new limits similar to those in §2255 on successive petitions, applies by its terms only to a second or successive application under §2244 or §2254. 28 U.S.C. §2244(b)(2), (b)(3). Hanserd's §2255 motion was, axiomatically, a motion rather than an application and was filed in district court under §2255 rather than §2244 or §2254. We therefore conclude that if Hanserd is now barred from filing a §2255

motion, he may raise his *Bailey* claim under §2241.

In *Gray-Bey v. United States*, 209 F.3d 986 (7th Cir. 2000), the federal district court in Arkansas had transferred the §2241 proceeding to the Seventh Circuit and the Seventh Circuit then transferred the case back to Arkansas. Although the Seventh Circuit held that relief was not available to consider a second petition under §2255, the court expressly recognized a jurisdictionally barred claim under §2255 is not automatically jurisdictionally barred under §2241:

> What then of sec. 2241, which was not amended by the Antiterrorism and Effective Death Penalty Act?
>
> [A] district court presented with a petition for a writ of habeas corpus under sec. 2241 should analyze that petition on its own terms, without assuming that whatever cannot proceed under sec. 2255 also cannot proceed under sec. 2241 – ....

In *Hernandez v. Campbell*, 204 F.3d 861 (9th Cir. 2000), the Custodial Court had transferred a §2241 petition to the Sentencing Court, which is what the government had suggested to the Magistrate in this case. The Ninth Circuit reversed and remanded. The court observed:

> Under the strict provisions of the recently-enacted AEDPA, prisoners may only file second or successive petitions in extremely narrow circumstances. It is therefore likely that federal courts will see more attempts to bring §2241 petitions pursuant to the Savings Clause, because, in many instances, federal prisoners will have no other avenue through which collaterally to

> attack their sentences. Thus, in such circumstances, it is imperative, as a matter of the initial determination of jurisdiction, that district courts first determine whether the Savings Clause permits the filing of a §2241 habeas corpus petition.

Although the Seventh and Ninth Circuits both recognize the right to seek §2241 jurisdiction, the key issue that is still confused and unresolved is the meaning of the Savings Clause. The result of the cases is a limitation that amounts to the suspension of habeas corpus. When a prior §2255 relief was denied, jurisdiction fails for even the first petition under §2241. As Congress may not enact such a suspension without the gravest of constitutional concerns, this Court should not acquiesce in a judicial suspension. Davis believes the right to file, coupled with the pleading of a meritorious claim of unconstitutional confinement, should give rise to jurisdiction. The constitutional problems would be far less if the first petition filed under §2241 would be determined upon the merits of the claim of unconstitutional confinement.

Certiorari would allow this court to provide guidance and uniformity to the Savings Clause jurisdictional provision. Because relief under §2255 now has been narrowed by the AEDPA, this safety valve is vital. To close it off and seal it from any use would produce "the gravest constitutional doubts" as expressed in *Sanders*. To make the Savings Clause meaningless and useless by applying unobtainable conditions is contrary to the express intent of Congress and principles proclaimed by this Court. This Court historically has been the great protector and the great interpreter of the writ of habeas corpus. For these reasons, certiorari should be granted.

II. ACTUAL INNOCENCE AND MISCARRIAGE OF JUSTICE PRINCIPLES SHOULD BE APPLICABLE TO SATISFY THE SAVINGS CLAUSE CONDITIONS FOR §2241 JURISDICTION.

Petitioner unsuccessfully urged that the actual innocence and miscarriage of justice principles applied to sentencing factors in capital cases should be applied to Davis' non-capital sentence of life without parole. These principles applied to his sentencing factors should satisfy the Savings Clause "inadequate or ineffective" condition for §2241 jurisdiction. Davis' pre-*Apprendi* life sentence was predicated on a number of sentencing factors not included in the indictment or found by the jury general verdict. The validity of these sentencing factors should provide a basis for relief under §2241.

The Magistrate summarily dismissed the need to address whether the actual innocence and miscarriage of justice standards applied to Petitioner's procedurally defaulted constitutional claims:

> Petitioner repeatedly refers to 'actual innocence' and 'miscarriage of justice' in his filings. However, the cases he cites simply do not apply to the 'inadequate and ineffective' inquiry. Most instead refer to the issue of procedural default in the context of a state prisoner's habeas petition under 28 U.S.C. §2254, or to abuse of the writ issues in cases filed prior to the AEDPA.

(Appendix F, p. 13, fn. 2)

The Tenth Circuit's Order in affirming merely noted the existence of the argument, "He also contended that he is actually innocent."

The issue of whether the actual innocence and miscarriage of justice standards applies in the non-capital cases is a matter of great public importance and one this Court has had an inclination to address. *See Dretke v. Haley*, 541 U.S. 186 (2004). The Supreme Court granted certiorari in *Dretke* in order to address the issue, but instead remanded the case to the Fifth Circuit to determine whether relief could be granted on alternative grounds for ineffective assistance of counsel.

In *Sawyer v. Whitley*, 505 U.S. 333 (1992), a capital defendant was convicted of murder and sought habeas relief claiming to be actually innocent because of the withholding of several pieces of evidence from the jury during the sentencing phase of his trial. *Sawyer*, 505 U.S. 333 at 347. The *Sawyer* Court held that a federal court may hear the merits of a successive, abusive or procedurally defaulted claim, if the failure to hear the claim would result in a miscarriage of justice. *Id.* at 349.

The Petitioner must pass an "eligibility" test as first enunciated by the Supreme Court in *Sawyer* to qualify for actual innocence review of procedurally defaulted constitutional claims effecting the sentencing determination. The eligibility test requires analysis of whether the petitioner would have been eligible for the sentence received had the constitutional violation not occurred.

Petitioner contends his non-capital sentencing factors are similar to the *Sawyer* sentencing factors, justifying the application of the eligibility test. In both cases, the procedure by which the sentence was determined was similar. Secondly, the substance of Petitioner's claim is similar to that considered in *Sawyer*. In *Sawyer*, the question was not whether the petitioner was innocent of the murder for which he was convicted, but rather whether he was innocent of

aggravating factors upon which his death sentence was based. Similarly, in Emerson Davis' case, the jury's general verdict found Davis only guilty of conspiracy to distribute an undetermined amount of controlled substances and not the additional sentencing factors giving rise to the unconstitutional life sentence.

Certiorari should be granted to decide whether the sentencing factors of actual innocence and miscarriage of justice as applied to capital cases should be applicable to all non-capital cases. Those standards especially should apply in Emerson Davis' case, who was sentenced to life without parole. Expanding the application of the sentencing factors in capital cases to cases involving life without parole would be a very small but very logical step. A person under the death sentence is subject to confinement for the rest of his life in prison, which may be years, until the death sentence is executed. The prisoner dies while still incarcerated. Life without parole in the federal system, as this Court is well aware, literally means life without parole. .The prisoner will spend the rest of his life in prison until he dies. Like the prisoner under the capital sentence, he dies while still incarcerated.

CONCLUSION

This Petition for Certiorari should be granted.

Respectfully submitted,

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wvcreek_tlh@msn.com
Attorney for Petitioner

No. _____

In The

Supreme Court of the United States

EMERSON DAVIS,
Petitioner,

vs.

WARDEN, FEDERAL TRANSFER CENTER, OKLAHOMA CITY,
Respondent.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

APPENDIX FOR PETITION FOR WRIT OF CERTIORARI

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Attorney for Petitioner

INDEX TO APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

EMERSON O. DAVIS,

Petitioner - Appellant,

v. No. 04-6345

WARDEN, FEDERAL TRANSFER CENTER, OKLAHOMA CITY,

Respondent –Appellee,

and

UNITED STATES ATTORNEY,

Respondent.

ORDER

Filed July 13, 2005

Before **TACHA,** Chief Judge, **SEYMOUR** and **KELLY,** Circuit Judges.

Appellant's petition for rehearing is denied by the panel that rendered the decision.

Entered for the Court
PATRICK FISHER, Clerk of Court

By: /s/ Apala Carter
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

EMERSON O. DAVIS,

Petitioner - Appellant,

v. No. 04-6345

WARDEN, FEDERAL TRANSFER CENTER, OKLAHOMA CITY,

Respondent –Appellee,

and

UNITED STATES ATTORNEY,

Respondent.

ORDER

Filed June 14, 2005

Before **TACHA,** Chief Judge, **SEYMOUR** and **KELLY,** Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(0). The case is therefore ordered submitted without oral argument.

The petitioner appeals the dismissal by the United States District Court for the Western District of Oklahoma

of his petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2241. We affirm.

In the petition filed in the district court, the petitioner challenged the life sentence imposed by the United States District Court for the Northern District of Florida following his conviction for conspiracy to possess with intent to distribute cocaine, cocaine base, and marijuana. He alleged that, because the evidence was unclear as to the kind of controlled substance involved, he should have been given the lowest sentence possible. He also contended that he is actually innocent. The district court determined that relief under § 2241 is not appropriate and dismissed.

Normally, "'[a] petition under 28 U.S.C. § 2241 attacks the execution of a sentence rather than its validity and must be filed in the district where the prisoner is confined. A 28 U.S.C. § 2255 petition attacks the legality of detention, and must be filed in the district that imposed the sentence.'" *Haugh v. Booker*, 210 F.3d 1147, 1149 (10th Cir. 2000) (quoting *Bradshaw v. Story*, 86 F.3d 164, 166 (10th Cir. 1996)). Section 2241 "is not an additional, alternative, or supplemental remedy to 28 U.S.C. § 2255." *Bradshaw*, 86 F.3d at 166. Only if the petitioner shows that § 2255 is "inadequate or ineffective" to challenge the validity of a judgment or sentence may a prisoner petition for such a remedy under 28 U.S.C. § 2241. *Id.* "Failure to obtain relief under § 2255 does not establish that the remedy so provided is either inadequate or ineffective." *Id.* (quotation omitted).

The petitioner has not established the inadequacy or ineffectiveness of 28 U.S.C. § 2255. His brief filed in this court essentially argues that the Eleventh Circuit erred in affirming his conviction and sentence and in denying relief under § 2255.

Accordingly the judgement of the district court is **AFFIRMED.** The petitioner's motion to order the government to file a brief is **DENIED.** The mandate shall issue forthwith.

Entered for the Court
PATRICK FISHER, Clerk of Court

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

EMERSON DAVIS,

Petitioner;

vs. Case No. CIV-03-1671-M

WARDEN, FTC OKLAHOMA CITY,

Respondent.

ORDER

Before the Court is Petitioner's Motion to Reconsider [docket no. 26], filed October 7, 2004. Having considered the same, the Court finds that Petitioner's motion should be, and the same hereby is, DENIED,

IT IS SO ORDERED this 12th day of October, 2004.

Vicki Miles-LaGrange

VICKI MILES-LaGRANGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

EMERSON DAVIS,

Petitioner;

vs. Case No. CIV-03-1671-M

WARDEN, FTC OKLAHOMA CITY,

Respondent.

JUDGMENT

Having dismissed Petitioner's Petition for Writ of Habeas Corpus by separate order issued this same date, the Court hereby enters judgment in favor of Respondent WARDEN, FTC OKLAHOMA CITY, and against Petitioner EMERSON DAVIS.

ENTERED at Oklahoma City, Oklahoma this 23rd day of September, 2004.

Vicki Miles-LaGrange

VICKI MILES-LaGRANGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

EMERSON DAVIS,

Petitioner;

vs. Case No. CIV-03-1671-M

WARDEN, FTC OKLAHOMA CITY,

Respondent.

ORDER

On August 30, 2004, United States Magistrate Judge Doyle W. Argo issued a Report and Recommendation in this habeas action brought pursuant to 28 U.S.C. § 2241. Magistrate Judge Argo recommended that this Court grant Respondent's Motion to Dismiss Habeas Corpus Petition and, correspondingly, dismiss Petitioner's Petition for Writ of Habeas Corpus for want of jurisdiction. The parties were advised of their right to object to the Report and Recommendation by September 20, 2004. Petitioner timely filed an objection.

The Court has carefully considered this matter *de novo*. The Court agrees with the Magistrate Judge's Report and Recommendation in all respects. Accordingly, the Court:

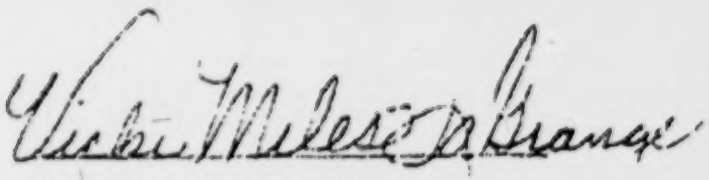
(1) ADOPTS the thorough and well-reasoned Report and Recommendation [docket no. 22] issued by Magistrate Judge Argo on August 30, 2004;

(2) GRANTS Respondent's Motion to Dismiss Habeas Corpus Petition [docket no. 14];

(3) DISMISSES Petitioner's Petition for Writ of Habeas Corpus (docket no. 1] for want of jurisdiction; and

(4) ORDERS that judgment be entered in favor of Respondent forthwith,

IT IS SO ORDERED this 23rd day of September, 2004.



VICKI MILES LaGRANGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

EMERSON DAVIS,

Petitioner;

vs. Case No. CIV-03-1671-M

WARDEN, FTC OKLAHOMA CITY,

Respondent.

REPORT AND RECOMMENDATION

Petitioner, a federal prisoner appearing pro se, brings this action pursuant to 28 U.S.C. § 2241 seeking a writ of habeas corpus. Pursuant to an order entered by United States District Judge Vicki Miles LaGrange, the matter has been referred to the undersigned Magistrate Judge for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B). Respondent has filed a motion to dismiss or, in the alternative, to transfer the case to the United States District Court for the Northern District of Florida. Petitioner has responded,[7] and thus the matter is at issue and ready for disposition. For the reasons set forth below, it is recommended that the motion be granted and the case be dismissed.

By this action, Petitioner challenges his August 8, 1996 conviction, after a jury trial, of conspiracy to possess with intent to distribute cocaine, cocaine base, and marijuana[8] in the United

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[7] Petitioner has also filed a supplemental response to the motion to dismiss/transfer, as well as a "suggestion" that the Court direct are sponse on the merits. All three of these have been considered by the undersigned in formulating this Report and Recommendation. [Doc. Nos. 17, 18. 21].

[8] Petitioner was also convicted of nine counts of money laundering, but he is apparently not challenging those convictions in this petition.

States District Court for the Northern District of Florida, Case No. 4:92-cr-O4013. Petitioner appealed his conviction, and the Eleventh Circuit Court of Appeals affirmed without opinion on June 26, 1998. Petition,[9] p. 2; United States v. Davis, No. 96-2879, 149 F.3d 1193 (11th Cir. June 26, 1998). Thereafter, Petitioner filed a motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 in the Northern District of Florida. Petition, p. 3. The motion was denied on September 23, 2002, after an evidentiary hearing. Petitioner raised several issues in that action, including the failure of the trial court to sentence him "on the basis of the lowest guidelines for cocaine or marijuana." Petition, p. 3. It appears that a certificate of appealability was denied .by the Eleventh Circuit on January 9, 2003. See United States v. Davis, 4:92-cr-04013, Doc. No. 1603. Petitioner is currently serving his sentence in the United States Penitentiary at Atlanta, Georgia, [Doc. No. 10] but the petition was filed while Petitioner was housed at the Federal Transfer Center in Oklahoma City, Oklahoma.[10]

The primary issue raised in the petition herein involves alleged errors during Petitioner's trial, all of which implicate the validity of his conviction and sentence. Specifically, Petitioner contends that although he was convicted of a conspiracy involving cocaine, cocaine base, and marijuana, that he should for various reasons have been sentenced on the basis of the substance that would have rendered the shortest period of confinement.

Petitioner states that his sentence of imprisonment was "Life and 240 months, to run concurrent."

[9] Petitioner has filed both a form petition and his own petition. To avoid any confusion caused by duplicate numbering of the two, the undersigned will refer to the latter as a brief in support of the petition.

[10] Petitioner states that he also has an unrelated action of some sort pending in the United States District Court for the Western District of Louisiana. Petition, 3.

Respondent moves the Court to either dismiss the petition or to transfer it to the United States District Court for the Northern District of Florida. In support, Respondent claims that Petitioner cannot bring a petition under § 2241 that attacks the validity of his conviction unless the remedy under 28 U.S.C. § 2255 is inadequate or ineffective to test the legality of his detention. Alternatively, Respondent moves the Court to transfer the case to the Northern District of Florida, where jurisdiction lies over a motion under § 2255. For the following reasons, the undersigned finds that the petition herein seeks a remedy only available through a motion under § 2255, and so recommends that Respondent's motion to dismiss be granted.

To determine whether this Court should entertain Petitioner's application for a writ of habeas corpus, the Court must first decide whether Petitioner's cause arises under § 2241 or § 2255. It is well settled that an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 and a motion filed pursuant to 28 U.S.C. § 2255 serve separate and distinct purposes. A petition under 28 U.S.C. § 2241 attacks the execution of a sentence and must be filed in the district where the prisoner is confined. Bradshaw v. Story, 86 F.3d 164, 166 (10th Cir. 1996). On the other hand, a "§ 2255 petition attacks the legality of detention and must be filed in the district that imposed the sentence." Id.[11] See also McIntosh v. United States Parole Commission, 115 F.3d 809, 811 (10th Cir. 1997) (stating that proceedings under 28 U.S.C. §§ 2254 and 2255 "are used to collaterally attack the validity of a conviction and sentence"). A petition under § 2241 "is not an additional, alternative, or

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[11] Title 28 U.S.C. § 2255 provides in part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

supplemental remedy" to a § 2255 proceeding. Bradshaw, 86 F.3d at 166 (citations omitted). Nevertheless, a § 2241 petition which attacks custody resulting from a federally imposed sentence may be entertained when the petitioner can satisfy the requirements of the so-called "savings clause" in § 2255. That clause states:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, *unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.*

28 U.S.C. § 2255 (emphasis added). However, this exception is extremely narrow. Caravalho v. Pugh, 177 F.3d 1177, 1178 (10th Cir.1999). Examples of when such might be the case are when the original sentencing court is abolished, when the sentencing court refuses to consider the § 2255 petition altogether, when the court inordinately delays consideration of the petition, or when no one court could grant complete relief. Id. It is Petitioner's burden to show that the § 2255 remedy is inadequate or ineffective, and a previous failure to obtain relief under § 2255 does not establish that the remedy so provided is either inadequate or ineffective. Bradshaw, 86 F.3d. at 166 (citing Williams v. United States, 323 F.2d 672, 673 (10th Cir. 1963)). In his effort to demonstrate that his § 2255 remedy is inadequate or ineffective, Petitioner argues extensively that the district court in the Northern District of Florida erred in denying the § 2255 motion he filed there. He also makes a claim - with no elaboration whatsoever -that "the issues presented for adjudication involve facts that occurred after the imposition of

sentence." Brief in Support of Petition, p. 25.[12] Not only does Petitioner fail to elaborate, his arguments indicate that it is simply untrue. Accordingly, Petitioner has failed to show that his remedy to challenge his conviction and sentence under § 2255 is inadequate and ineffective.[13] Therefore, this Court may not entertain Petitioner's § 2241 application for writ of habeas corpus. Webb v. Booker, No. 96-1034, 1996 WL 314088 (10th Cir. Jun. 5, 1996) (district court lacked jurisdiction to consider § 2241 petition challenging sentence because petitioner had adequate and effective remedy under § 2255).[14]

As Petitioner's application clearly seeks a remedy only available through a motion under 28 U.S.C. § 2255, the United States District Court for the Northern District of Florida is the proper forum. 28 U.S.C. § 2255; Haugh v. Booker, 210 F.3d 1147, 1149 (10th Cir. 2000). Accordingly, it is recommended that the petition be dismissed.

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[12] Petitioner repeatedly refers to "actual innocence" and "miscarriage of justice" in his filings. However, the cases he cites simply do not apply to the "inadequate or ineffective" inquiry. Most instead refer to the issue of procedural default in the context of a state prisoner's habeas petition under 28 U.S.C. § 2254, or to abuse of the writ issues in cases filed prior to the AEDPA.

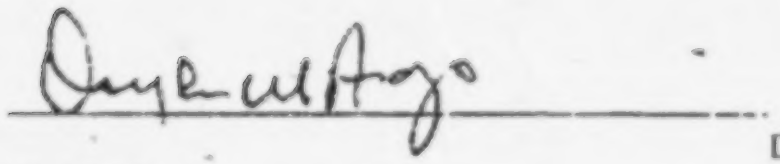
[13] Petitioner also attempts to show that his claim is properly brought under § 2241 by stating that he would have now completed the lesser sentence to which he claims to be entitled, and that "the continued and further execution of sentence violates his constitutional rights ...." Petitioner's Response to Motion to Dismiss, p. 5. However, Petitioner's attempt to cleverly couch the issue as one of execution of his sentence is unavailing, as his argument clearly has at its foundation a claim that the sentence he did in fact receive was unlawful.

[14] Unpublished disposition cited herein as persuasive authority pursuant to Tenth Circuit Rule 36.3.

RECOMMENDATION

For the reasons set forth above, it is recommended that Respondent's motion to dismiss [Doc. No. 14] be granted, and that this action be dismissed. Petitioner is advised of his right to file an objection to this Report and Recommendation with the Clerk of this Court by September 20, 2004, in accordance with 28 U.S,C. § 636 and Local Civil Rule 72.1. Petitioner is further advised that failure to make timely objection to this Report and Recommendation waives his right to appellate review of both factual and legal issues contained herein. Moore v. United States, 950 F.2d 656 (10th Cir.1991). This Report and Recommendation disposes of all issues referred to the Magistrate Judge in this matter.

ENTERED this 30th day of August, 2004.



DOYLE W. ARGO
UNITED STATES MAGISTRATE JUDGE

No. 05-472

In the Supreme Court of the United States

EMERSON DAVIS,

Petitioner

vs.

WARDEN, FEDERAL TRANSFER CENTER, OKLAHOMA CITY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Brief of Amicus Curiae Florida Innocence Initiative, Inc. behalf of Petitioner

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Table of Authorities

Interest of Amicus Curiae[1]

Florida Innocence Initiative, Inc. is a non-profit Florida corporation formed to pursue judicial relief for persons imprisoned in Florida jails and prisons for crimes they did not commit.[2]

The amicus submits this brief not only in support of the Petitioner, but in the interest of those imprisoned in our jails and prisons who are *actually innocent* of the crimes for which they are being held, regardless of the length or specifics of the sentences.[3] FII is patterned after, and works closely with, The Innocence Project, as are many similar organizations throughout the country who operate in what is known as The Innocence Network. For those whose freedom has been taken because of ineffective counsel, by overzealous prosecutors, or even by a well-intentioned society justifiably alarmed by distressingly high crime rates that affect many of us directly and all of us indirectly, the members of The Innocence Network are often their only hope. Indeed, the Innocence Network is

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[1] Pursuant to Rule 37.6 of this Court, the Amicus represents that counsel for the Amicus authored this Brief in its entirety, *pro bono*, and that no person or entity made any monetary contribution to the preparation or submission of this Brief.

[2] The Florida Innocence Initiative, Inc. will be referred to herein as "FII."

[3] Some may believe that a brief period of incarceration – say, for a few weeks or months – is merely inconvenient or unpleasant. Anyone who shares that belief has never spent time in jail for an offense he did not commit.

responsible for saving the lives of many innocent persons sentenced to death.[4]

The Innocence Project, founded by attorneys Barry C. Scheck and Peter J. Neufeld in 1992, "is a non-profit legal clinic and criminal justice center . . . work[ing] to exonerate the wrongfully convicted through postconviction DNA testing . . . ."[5] While the Innocence Project would not be available to the Petitioner,[6] the core principle in his case and in those Innocence Project cases is the same: that no one should be imprisoned for acts that he did not commit, regardless of the circumstances of the case and irrespective of any technical judicial hurdles that continue his confinement.

FII comes to this Court in support of the Petitioner's request that the Court grant review of his unlawful confinement, brought about by a provision in the Anti-Terrorist Effective Death

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[4] Interestingly, if members of the Innocence Network raced into burning buildings to save people trapped inside, they would be universally acclaimed – rightfully so – as heroes. When all they do is save the lives of innocent prisoners on death row, too many in our society simply view them as obstructionist interlopers arguing "legal technicalities."

[5] The Innocence Project, www.innocenceproject.org.

[6] The Innocence Project only involves itself in cases where post-conviction DNA testing conclusively establishes the innocence of an incarcerated defendant. There are similar programs in at least 42 states that are available to innocent persons in cases where DNA evidence would not be helpful.

Penalty Act ("AEDPA").[7] This Petitioner is not a terrorist, just as the many cases in which The Innocence Network has won the freedom of others did not involve terrorists. This Petitioner is *technically* not subject to a sentence of death, but because of his sentence of life imprisonment without parole, he will die in a federal prison from natural causes instead of a lethal injection. Putting that legal nicety aside, Emerson Davis could not have been sentenced to death. Thus, at first blush, one would think that the AEDPA has nothing to do with Davis. One would be wrong.

Because of the construction of the AEDPA by the lower federal courts, that statute has the unfortunate consequence of suspending the writ of habeas corpus. Congress recognized its constitutional obligation when it enacted the Savings Clause, leaving the judicial door open for the correction of conviction and sentencing errors. Unfortunately, the federal courts are doing their best to close that door, dooming many innocent people to a life behind bars.[8] Unless this Court fulfills its constitutional role and prevents these thousands of miscarriages of justice, we will be much less as a society.

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[7] The Petitioner was sentenced to life without parole by the United States District Court for the Northern District of Florida.

[8] It is difficult to even imagine what goes on in the minds of those people in such Kafka-esque situations.

Summary of the Argument

Every American child learns to recite the words "with liberty and justice for all." Liberty is freedom, the antithesis of confinement. And when this nation ceases to treasure liberty, when it no longer acknowledges that liberty is at the pinnacle of rights for which countless numbers of our citizens have fought and died, this nation can no longer lay claim to the moral high ground. The writ of habeas corpus must be available to the innocent.

Too many cases have established that our jails and prisons hold thousands of innocent people. This abuse must be ended, and a suspension of the writ of habeas corpus will only make it worse.[9]

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[9] America already imprisons more of its citizens, *per capita*, than any nation on Earth. We need not continue to confine innocent people to maintain our lead in this dubious statistic.

Argument

> *That it is better 100 guilty Persons should escape than that one innocent Person should suffer, is a Maxim that has been long and generally approved.*
>
> Benjamin Franklin[10]

Whatever one's political philosophy or ideological bent may be, it is hard to imagine how any reasonable American could say that our great nation has *any* legitimate interest in imprisoning an innocent man or woman. It is also difficult to place oneself in the mind of that individual, spending weeks, months or years – and perhaps the remainder of his life – in a cell, denied the most cherished of those rights guaranteed under the Constitution of the United States – liberty.[11]

Yet, incredibly, that is at the real core of the case presented to this Court in the Petition for Writ of Certiorari. This Court is *really* being asked to decide if the incarceration of one who is being held longer than a lawful sentence allows is so

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[10] The Writings of Benjamin Franklin, ed. Albert H. Smyth, vol. 9, p. 293 (1906).

[11] President Woodrow Wilson, in a quote inscribed on a plaque on the stairwell in the Statute of Liberty, said: "I would rather belong to a poor nation that was free than to a rich nation that had ceased to be in love with liberty."

fundamentally unfair that it is, without more, a manifest injustice.

The Petitioner's plight is common to many who are serving illegal sentences. Just as in *Dretke v. Haley,* 541 U.S. 386 (2004), those individuals are in prison after serving their lawful sentences. But the jurisdictional hurdle enacted by Congress in AEDPA will result in the *de facto* suspension of the treasured writ of habeas corpus, a violation of constitutional proportions.[12]

1. *Sawyer* should guide the Court.

In *Sawyer v. Whitley,* 505 U.S. 333 (1992) this Court held that the "manifest injustice" exception applies to successive habeas corpus petitions, even though that language had been removed from 28 U.S.C. § 2244(b) in 1966. The Court recognized that a colorable claim of actual innocence should suffice to warrant habeas corpus review. *Id,* at 339. The Court noted that the exception also applies to procedural default cases. *Id.* (citing *Murray v. Carrier,* 477 U.S. 478 (1986).

Robert Wayne Sawyer was not "innocent" in the purest sense. His claim was that he should not have been subjected to the death penalty, because he was "innocent" of the aggravating factors. While

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[12] Article I, Section 9, Clause 2 of the Constitution of the United States reads: The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

agreeing with the lower courts that Sawyer had failed to demonstrate his "actual innocence," this Court did say that the actual innocence exception applies to capital sentences.

That is the posture of Emerson Davis' case; he claims only that his sentence is illegal because there was no proof of the required aggravating factor that changed his maximum exposure from 5 years to life without parole. That was the identical situation in *Haley*, in which the maximum sentence was unlawfully increased from 2 years to 16 ½ years. If we cannot execute an innocent prisoner without giving him the opportunity, in a § 2241 proceeding, to demonstrate his actual innocence, why can we keep an innocent man in prison until he dies of natural causes? Yet unless an innocent prisoner is relying on "newly discovered evidence" or a "new rule of constitutional law," he has no forum in which to advance his actual innocence claim. If his ineffective trial counsel also filed his initial § 2255 motion, he is helpless unless he has received a sentence of death – that is, a sentence of lethal injection instead of imprisonment until he dies.

In *Sanders v. United States*, 373 U.S. 1 (1963) this Court said that "Conventional notions of finality of litigation have no place where life or liberty are at stake . . . If 'government [is] always [to] be accountable to the judiciary for a man's imprisonment' . . . access to the courts on habeas must not be thus impeded" (citing to *Fay v. Noia*, 372 U.S. 391, 402 (1963)). Ironically, it is now the courts that are impeding access to the writ, by so

narrowly construing the Savings Clause in § 2255 to make it virtually impossible to obtain review of an illegal sentence.[13]

Sanders, *Sawyer* and the other decisions concerning successive petitions for relief certainly did not say that it is wrong to execute an innocent man but acceptable to imprison him for the rest of his life. As this Court said in *Sanders*, when *liberty* is at stake, an innocent prisoner must always have the hope that the Great Writ will issue and end the manifest injustice he is suffering.

In considering whether to grant review of Emerson Davis's sentencing error, this Court should be guided by the principle from *Sawyer*. Whenever an imprisoned person makes a *colorable* claim that he is actually innocent, either of the crime for which he was convicted or of factors that result in an enhanced sentence, the writ of habeas corpus should always be available. Fundamental fairness demands it.

2. Innocence MUST be the issue

While the questions presented here are jurisdictional in nature – asking, in effect, whether Congress has unconstitutionally suspended the writ of habeas corpus – the *real* issue is innocence. That

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[13] As this Court has long recognized, the writ of habeas corpus is grounded in our constitutionally recognized concept of fundamental fairness. *Sanders*, 373 U.S. 1 (1963). Imprisoning someone for a period of time longer than the maximum sentence is not fundamentally fair.

is what separates us from those barbaric nations that throw citizens in prison for no valid reason. As Justice Stevens wrote in his dissent in *Haley*, "The unending search for symmetry in the law can cause judges to forget about justice." 541 U.S. at 396.

It might be helpful to briefly review the testimony given by Innocence Project co-founder Barry C. Scheck before the United States Senate's Judiciary Committee, at a hearing on July 13, 2005 titled "Habeas Corpus Proceedings and Issues of Actual Innocence." Mr. Scheck recounted details of several cases, including the following:

- Ron Williamson was convicted and sentenced to death in Oklahoma, largely because of his grossly ineffective lawyer. He spent twelve years awaiting execution; his co-defendant, Dennis Fritz, spent those same twelve years because of the life sentence he received. Both men always proclaimed their innocence. In 1995, their convictions were vacated by the United States District Court after a hearing on a writ of habeas corpus. *Williamson v. Reynolds*, 904 F. Supp. 1529 (E.D. Okla. 1995), *aff'd*, 110 F.3d 1508 (10th Cir. 1997).[14] The actual killer – who had been the principal witness against Morrison and Fritz – was subsequently prosecuted and convicted of the murder. Ron Williamson came within *five*

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[14] Some might wonder, considering that the State appealed that order, why we are so zealous in trying to keep innocent people in prison.